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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 1011

WILLIAM BERRYHILL,
Petitioner,

vs.

PACIFIC FAR EAST LINE, INC.,
a corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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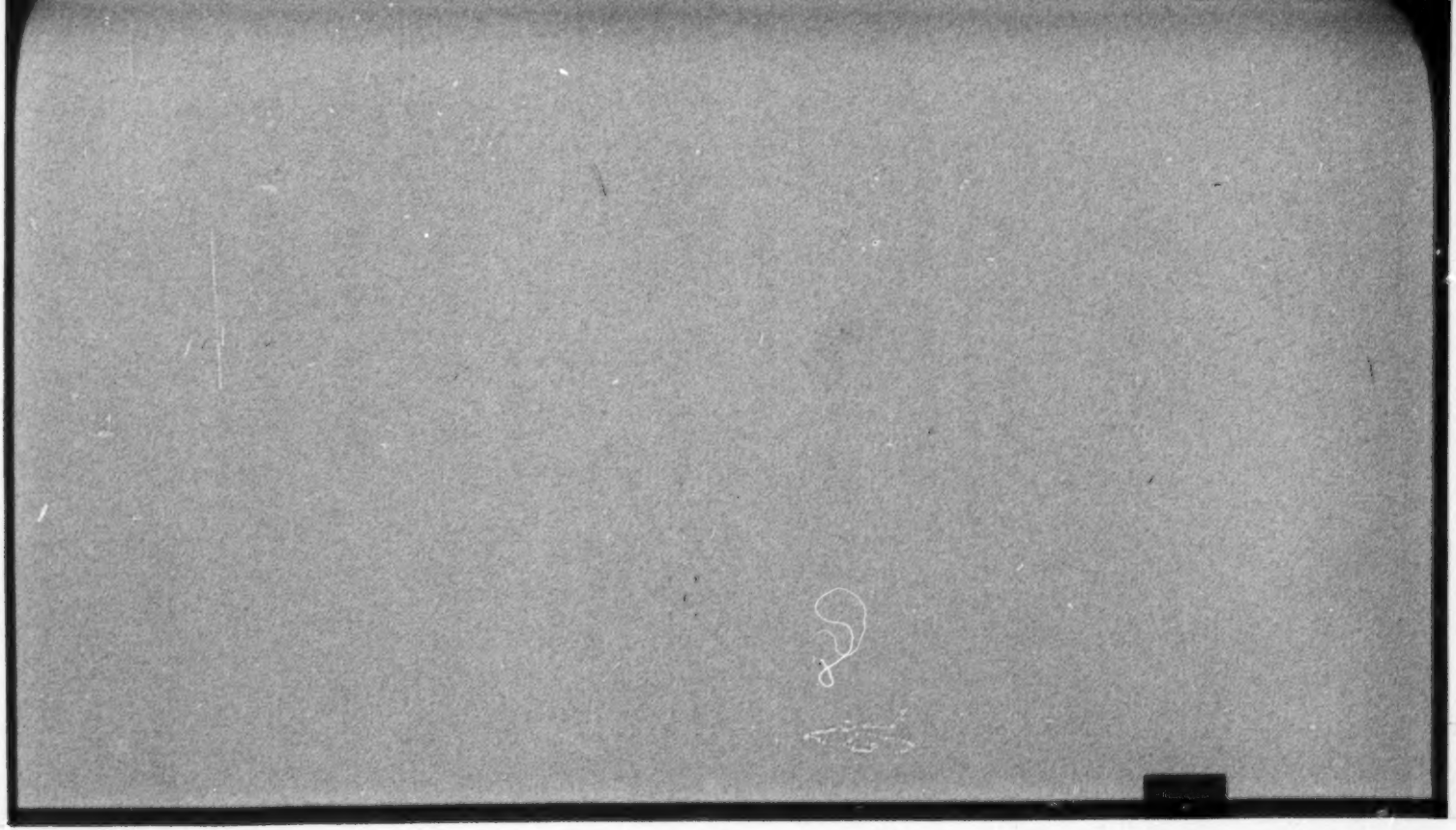

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to the United States Court of Appeals for the Ninth Circuit.

Petitioner William Berryhill prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered October 24, 1956, the petition for rehearing having been denied on February 18, 1957. (R. 42.)

OPINIONS BELOW.

The opinion of the District Court (R. 22-24) is reported in 138 F. Supp. 859. The opinion of the Court of Appeals (R. 35-40) is reported in 238 F. 2d 385.

JURISDICTION.

The judgment of the Court of Appeals by which petitioner's complaint was dismissed, was entered on October 24, 1956 (R. 41.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

Whether a shoreside machinist who is injured while he is doing a seaman's work aboard a vessel then in dry dock and in furtherance of his employer's contract to perform ship's services aboard the shipowner's vessel with the latter's consent, is entitled to the shipowner's traditional warranty of the seaworthiness of the vessel.

STATEMENT.

The facts are not in dispute. The complaint (R. 3-7), as particularized by answers to interrogatories propounded by respondent (R. 16-20), shows:

On December 20, 1953, the SS FLYING DRAGON, a sea-going vessel owned and operated by the respondent was docked for repairs at Todd Shipyards Corporation (hereinafter referred to as Todd), pursuant

to a contract between Todd and the respondent. On that day petitioner, a marine machinest's helper, and others employed by Todd went aboard the vessel to make the necessary repairs to enable the ship to continue in the business of cargo carriage. Petitioner was assisting a marine machinist to grind the "vessel's shaft keyway." In doing this repair work, the machinist used a grinding tool to which was affixed one of several available grinding wheels. The grinding tool itself was furnished by Todd and was brought aboard the vessel by the machinist; the grinding wheels were on the vessel when petitioner and the machinist reported aboard for work, having apparently been left there by machinists who worked the preceding work shift.

While the two men were grinding the shaft keyway the grinding wheel, affixed to the grinder, exploded and shattered. Fragments of the wheel struck the petitioner. His resultant injuries were directly and proximately caused by respondent's failure to furnish him with safe and seaworthy tools with which to perform his work.

The petitioner maintains that although he was employed by a shoreside ship repair yard to make repairs aboard respondent's vessel, his work was that of a marine machinist, and that at the time of his injury, he was doing seaman's work, or "ship's work," within the ambit of precedent judicial acceptance of the meaning of this phrase.

The Court below found as a fact, that petitioner seeks redress for his injuries, sustained during repairs

to the "shaft keyway" of the vessel, "when a grinding wheel, owned and furnished by appellant's employer, Todd Shipyards Corporation, shattered or disintegrated while the SS FLYING DRAGON, owned by appellee was docked for repairs." (238 F.2d 385.)

The "shaft keyway" is a device to keep the ship's propeller from turning on the shaft. Sometimes also referred to as a "shaft tunnel or shaft alley," it is a watertight passage housing the propeller shafting from the engine room to the bulkhead at which the stern cube commences; it provides access to the shafting and bearings and also prevents any damage to it from cargo in the space through which it passes. The "shaft keyway" which is used to connect the propeller of the shaft, consists of longitudinal grooves cut into the shaft itself, and also into the propeller. The "key" itself is shaped like a half moon and fits into the groove on the shaft and the upper part of the "key" fits into the groove in the propeller, thus preventing the propeller from rotating freely on the shaft. It connects with the shaft tunnel or shaft alley.

In considering this petition, the Court may find it desirable to requisition of the parties some visual demonstration of the shaft keyway, in which event both sides can agree to furnish the Court with the builder's block diagram, drawings, blueprint, or perhaps a photograph of the device involved herein. It will thus be made apparent that when the petitioner was injured by the exploding grinding wheel he was doing a seaman's work or "ship's work" as defined by

this Court in *Sieracki*,[1] and subsequent cases decided by this as well as federal Courts at all levels, throughout the Circuits.

REASONS FOR GRANTING THE WRIT.

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT; IT IS ALSO IN CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS.

Before the era of "increasing commerce and the demand for rapidity and special skill" *(Atlantic Transport Co. v. Imbrovek,* 234 U.S. 52, 61, 58 L. Ed. 1208, 1213) virtually all of the ship's work was performed by the ship's crew. The traditional protection afforded the crew extended equally to the work of loading, unloading, repairing and refitting the vessel and was equally applicable whether the ship was at sea or in port. The safe carriage of passengers and cargo and the safety of the ship itself depended in large measure upon proper performance of the work, whether navigational or non-navigational, in character. It was a service absolutely necessary to enable the ship to discharge its maritime duty. The ship was bound to furnish the crew with a reasonably safe place to work, and a safe and seaworthy vessel, an obligation which encompassed within its scope the diverse procedures involved in loading, unloading, repairing and refitting the vessel. As the need for specialization increased, shipowners developed the practice of hiring men for the specific purpose of tending

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[1] *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 90 L. Ed. 1099 (1946).

to these non-navigational phases of the vessel's enterprise. This included contracts made with shipyards for all types of repairs aboard the vessel. In so doing the shipowner did not relieve himself of this traditional obligation, for these men, though not members of the crew, were doing precisely the work of the crew, as necessary to the accomplishment of the ship's enterprise, as navigation itself. Rightly these men looked to the vessel for the safe accomplishment of their work.

In these modern days, breakdowns at sea and even in port are not at all unusual. The licensed engineers for example, and others in the engine room of a vessel, repair whatever has to be done on the vessel, even to the point of making a major repair to the largest structures on board. In other words, everything on board the ship was historically taken care of by the seaman, so far as repairs were concerned. The shipyard, with respect to the work which engine room craftsmen perform—a machinist in the instant case—is just as much an innovation, as the growth of longshore and stevedoring activities, and the development of those categories of specialized labor with which *Sieracki,* supra, *Hawn,*[2] *Petterson*[3] and *Rogers*[4] were concerned. The foregoing triad of cases in this Court, since *Sieracki,* in principle, entitles the petitioner to

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[2]*Pope and Talbot, Inc. v. Hawn,* 346 U.S. 406, 98 L. Ed. 143 (1953).

[3]*Alaska Steamship Company v. Petterson,* 347 U.S. 396, 74 S. Ct. 601 (1954).

[4]*Rogers v. U. S. Lines,* 347 U.S. 984, 74 S. Ct. 849 (1954).

the maritime seaworthiness rights spelled out in those cases, for personnel other than seafaring men.

Indeed the United States in at least one case (infra), conceded in a brief recently filed with this Court that a shoreside electrician employed by a ship repair company who was injured while the vessel was "high and dry" in a shipyard for purposes of improvement and "general overhaul," * * * is, of course, entitled to a *seaworthy* ship * * *"[5] (Emphasis supplied.)

The decision below is not only in conflict with the aforementioned decisions of this Court, but is also contrary to the decisions of other Circuit Courts. For example:

Lester v. United States, supra, is four square with the instant case. Certiorari was granted by this Court on November 5, 1956, to review the remand by the Court of Appeals (234 F. 2d 625, C.C.A. 2, 1956), by which it directed the District Court to dismiss the libel. Lester, a shoreside electrician, employed by a ship repair yard, was injured during the course of his work, while the vessel was "high and dry in the No. 2 dry dock of Marine Basin Co." on which day the vessel, owned by the United States "was undergoing a *general overhaul* by Marine Basin." (234 F. 2d 625-626.)[6] (Emphasis supplied.) The District Court (127 F. Supp. 413), found for libelant on the unseaworthi-

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[5] *Lester v. United States,* 352 U.S. 889; Oct. Term, 1956. ("Brief for the United States in Opposition" to *Lester's* petition for a writ of certiorari, pp. 2, 8.)

[6] The analogy to the instant case is obvious.

ness statement of claim, but denied relief on the negligence count. The Court of Appeals (pp. 627-628) refused to adopt the District Court's rationale which led it to find unseaworthiness. Had the Court of Appeals been of the opinion that the warranty of seaworthiness did not apply in the *Lester* case, it would certainly have stated it as an additional reason for reversing the District Court.

The Court of Appeals did in fact consider the issue of unseaworthiness, raised by the pleadings, and found that it applied. It found, however, on the facts, that the vessel was not unseaworthy (234 F.2d 627).

The Government in opposing certiorari, *did not oppose it on the ground that the warranty of unseaworthiness does not apply in such a situation. It was of the view, as was the Court of Appeals, that the doctrine of seaworthiness was applicable.* In the brief of the United States in opposition to the petition for certiorari in the *Lester* case (cited in footnote No. 5, supra) the Government had this to say at page 8:

> "In this case, the accident underlying the litigation occurred on a clear day while the Q-100 was high and dry for purposes of improvement and overhaul. * * *
>
> Under the decisions of this Court,[6] *petitioner, a shore based electrician, is of course, entitled to a seaworthy ship* which means that the ship must be reasonably fit but not that it can 'weather all storms.' *Boudoin v. Lykes Bros. SS. Co.* 348 U.S. 336, 339. The Q-100 clearly met this test. * * *" (Emphasis supplied.)

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[6] "*Seas Shipping Co. v. Sieracki*, 328 US 85; *Pope & Talbot, Inc. v. Hawn*, 346 US 406; *Alaska SS Co. v. Petterson*, 347 US 396."

Thus did the Government unequivocally admit in the *Lester* case that a shore based worker is entitled to a seaworthy ship which is "high and dry for purposes of improvement and overhaul."[7]

Not only is the decision below in conflict with the decisions of this Court in *Sieracki, Hawn, Petterson* and *Rogers,* all supra, but it also conflicts with the disposition of the *Lester* case by the Court of Appeals of the Second Circuit.

In addition, the disposition of the Court below conflicts with the decision of the Sixth Circuit, in *Imperial Oil, Ltd. v. Drlik,* 234 F. 2d 4 (1956), in which case this Court on December *10, 1956, denied* a petition for a writ of certiorari (352 U.S. 941), just one month after certiorari was *granted* in the *Lester* case.

In the *Drlik* case, the Court of Appeals affirmed the District Court, but reduced the award for excessiveness. *Drlik,* like *Lester,* supra, and like *Berryhill* in the instant case, was a shoreside worker in the employ of a shipyard which was engaged in the repair

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[7]Certiorari was granted on November 5, 1956 (352 U.S. 889). On January 24, 1957 the proceedings in this Court were dismissed by agreement of counsel, pursuant to Rule 60 of the Rules of this Court (352 U.S. 983). The case was settled upon a stipulation reciting that the Government paid *Lester* the sum of $20,000.00 without interest or costs, although the District Court decree was for only $18,000. The order of mandate from the Court of Appeals making the decision of that Court the decision of the District Court was vacated. 1957 AMC 645.

of a vessel on drydock. He was injured in the course of the repairs being made to the vessel.

In denying petitioner any relief in the instant case, the Court below regarded the nature and extent of the repairs of dispositive significance, when it said:

> "In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the ship's work time, but were of sufficient importance to cause the ship to be drydocked" (238 F. 2d 387.)

However, the basic facts in *Lester* and *Drlik*, were apposite with the facts in the instant case. *Drlik* succeeded in the District Court and in the Court of Appeals. He also successfully resisted certiorari. This Court, in denying certiorari, had before it the following description of the work:

> "The Imperial Leduc had been materially damaged as the result of an explosion and fire, and at the time of the accident on August 8, 1952, was being repaired by the American Ship Building Company at its Toledo, Ohio, Yard. Appellee was an employee of the American Ship Building Company. The vessel was in drydock preparatory to being undocked for removal to an adjacent pier to complete repairs. She was headed bow in, with four of her mooring cables running from winches on her deck to spiles located ashore, which held her in a proper position while the drydock was being flooded." (234 F. 2d at p. 7.)

Unlike the finding of the Court below that the substantiality of repairs is a criterion as to whether the

doctrine of seaworthiness is to be extended to a shipyard worker, neither this Court nor the Courts of Appeals referred to have established a like condition:

The libel in *Drlik*, supra, was in two counts: (1) unseaworthiness under the General Maritime laws and (2) for general negligence. The Court of Appeals found that Drlik was entitled to the warranty of seaworthiness. It considered the question of the seaworthiness of the vessel, but found from the facts that the claim of unseaworthiness was not established. On the subject, the Court stated, at page 8 of 234 F. 2d:

> "The admiralty rule that the vessel and its owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment has been the settled law since the Supreme Court's ruling to that effect in The Osceola, 189 US 175, 23 S. Ct. 483, 47 L. Ed. 760. Mahnich v. Southern SS Co., supra, 321 US 96, 64 S. Ct. 455, 88 L. Ed. 561. The rule has lately been extended to stevedores and others doing a seaman's work and incurring a seaman's hazards, although not in the employ of the owner of the vessel. Seas Shipping Co. v. Sieracki, 328 US 85, 66 S. Ct. 872, 90 L. Ed. 1099. Pope & Talbot Inc., v. Hawn, 346 US 406, 412-413, 74 S. Ct. 202, 98 L. Ed. 143; Alaska Steamship Co. v. Petterson, 347 US 396, 74 S. Ct. 601, 98 L. Ed. 798. *Appellee would fall within the protection of the rule so extended.* However, in the present case there was no evidence that the vessel or any part of her equipment was defective." (Emphasis supplied.)

The Court did however find that the vessel was negligent.

The facts in *Lester* and *Drlik*, i.e. *both vessels were in dry dock for extensive repairs under a contract between a vessel owner and a shipyard, and in each the injuries were sustained by non-maritime land-based workers* (so very much like the situation of the petitioner herein), and the history of *Lester* and *Drlik* in this Court—are most indicative that this Court should afford petitioner the relief he now respectfully requests. It is significant that in *Lester* (where the Court of Appeals of the Second Circuit found that the warranty of seaworthiness applies, but held that on the merits, the libelant did not establish his claim), this Court on *November 6, 1956* granted Lester the writ to review the action of the Court below. In *Drlik*, where the Court of Appeals of the Sixth Circuit extended the benefits of the seaworthiness doctrine, in like circumstances, this Court *on December 10, 1956*, refused to review the disposition of the Court below. It would seem therefore that petitioner, whose situation is similar to that of *Lester* and *Drlik*, should be entitled to review the decision of the Court below.

II. THE DECISION BELOW IS ERRONEOUS; IT IS NOT IN ACCORD WITH THIS COURT'S VIEWS IN LIKE AND RELATED CASES.

The Court below points out that:

"The dissent (in the *Petterson* case) points out that the majority affirmance in Petterson goes one step further than Sieracki and Hawn cases, in holding that the equipment which causes the in-

> jury need not belong to the shipowner nor be a part of the ship's equipment." (283 F. 2d at p. 386),

and then poses the question, "Just how far should this doctrine be extended?" (p. 386).

An analysis of the dissenters' views in *Petterson*, leaves no room for doubt that the factors there unsuccessfully urged as a reason to deny the warranty of seaworthiness, fit the petitioner here, so that he too, is entitled to the warranty.

The step-by-step rationale by the Court below, following its reference to the *Petterson* case (on page 386 of the decision below), shows, upon analysis, that in the light of the decisions of this Court, the Court reached an erroneous conclusion, or, in view of *Lester* and *Drlik*, the Court below is in conflict with the Second and Sixth Circuits. At page 387, the Court below states:

> "The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends,[1] when the vessel is not on water. As the appellee here points out, a district court said in Manera v. United States, 124 Fed.Supp. 226 (E.D. N.Y. 1954):

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[1] "See:
Myers v. Pittsburgh Steamship Company, 165 F.2d 642 (1948);
Guerrini v. United States, 167 F.2d 352 (1948);
Martini v. United States, 192 F.2d 649 (1951);
Manera v. United States, 124 Fed.Supp. 226 (1954)."

'Since he was not a seaman and was not exposed to the peril of descending from the 'tween deck into the lower hold while the ship was rolling or pitching on the high seas, the test to be applied was that of what a business guest would be entitled to exact from the ship while in the performance of such a task as he was engaged in while the ship was lying at this repair yard dock. It is believed that the foregoing is a correct statement in view of all that was written in Pope and Talbot v. Hawn, 346 U.S. 406 (Brief for Appellee, p. 9).' "

Several observations are in order as to the *Manera* case upon which the Court below relied:

(a) The statement that "the very reason for the rule of absolute liability ends when the vessel is not on water" is in disagreement with the considerations in like circumstances, of the Second Circuit in *Lester*, and the Sixth Circuit in *Drlik*. Whether a vessel is on or out of water does not control the applicability of the seaworthiness doctrine to others than seamen.

(b) The further reasoning of the *Manera* case, which the Court below adopted, i.e., that the absence of the traditional hazards at sea, is sufficient to deny the warranty of seaworthiness to shoreside employees, is also incorrect because:

1. The District Court in *Manera*, relied on *Hawn* as justification for its views. But this was the very argument of the dissenting members of this court in *Hawn*, which must be deemed inappropriate since it obviously did not persuade the majority of the Court.

2. The *Manera* case was decided in September, 1954. It relied on *Hawn*, decided by this Court in

December, 1953. However, in the meantime, *Petterson* was decided by this Court in April, 1954. Mr. Justice Burton, writing for the dissenting view in the *Petterson* case, and by referring to the *Hawn* case, adopted the catalogue, in the latter case, of the many hazards and restrictions of the seafaring man, as contrasted with the work of a shoreside worker, which the dissenting members of this Court thought was an adequate reason why such an employee should not be entitled to the seaworthiness warranty. Mr. Justice Burton stated, at page 400 of 347 U.S.:

> "The historical analogy (as to seaman's hazards) disappears in the instant case. The modern stevedores, who supply substantial loading equipment, are a far cry from the traditional wards of the admiralty around whom the Court threw its protection in the *Osceola* case.[5]

[5]For a statement of the contrast between the traditional wards of the admiralty and modern longshoremen, see dissent in *Pope & Talbot v. Hawn*, 346 U.S. 406, 423-426 * * *"

In the earlier *Hawn* case, to which Mr. Justice Burton refers, the hazards of the seaman are graphically and fully discussed (346 U.S. at pages 423-424). The contrast was then drawn between the seaman's travails at sea, and Hawn's job ashore as a carpenter making repairs on the vessel:

> "Contrast the lot of this plaintiff (Hawn) who lived at home, was free to leave his employment, took no risks at sea, and had no different conditions or hazard attached to his employment than would have attached to a carpentry job in a building ashore." (346 U.S. at page 424.)

Thus, in both the *Hawn* and *Petterson* cases, the minority Justices of this Court sought without success, to persuade the majority members that because the hazards and disciplines of men at sea are greater than those to which shoreside workers are subjected, that therefore the latter should not benefit by the warranty of seaworthiness. So, within a four month period, this Court twice rejected that argument, and extended the doctrine of seaworthiness to men who work ashore. The *Manera* case upon which the Court below relies is therefore contrary to the views of this Court.

Moreover, the other cases upon which the Court below relies, and which are cited in the footnote on page 387 of its decision are also inapplicable for the following reasons:

(1) The *Meyers* (1948) case—The suit, by a shipyard worker, was not brought for a breach of the seaworthiness warranty. The injury occurred on a shipyard dock. The Court recognized the validity of *Sieracki,* but pointed out that the Meyers suit was brought for negligence only. In its dictum the Court conceded that if the action had sought relief for a breach of the seaworthiness guaranties, it would probably have to be extended to a case like *Meyers.* Furthermore, the case was decided three years before the *Hawn* and *Petterson* cases were decided by this Court.[8]

[8] *Rogers v. U. S. Lines,* cited in footnote No. 4, supra, was like the *Petterson* case, decided by this Court in 1954. The summary disposition by this Court is revealing, i.e., "The petition for certiorari is granted and judgment reversed," thus affording Rogers (a longshoreman) the benefits of the seaworthiness warranty.

(2) The *Guerrini* (1948) case—The Court denied the doctrine of seaworthiness to an injured shoreside ship's boiler-cleaning man. In discussing *Sieracki*, the Court refused to extend that case to *Guerrini* because the Court felt that it was bound to apply it only to stevedores engaged in "loading and unloading cargo." Judge Learned Hand conceded that *Sieracki* would probably have to be extended to the kind of shoreside worker involved in the *Guerrini* case, a prediction borne out by the decisions of this Court, subsequent to *Guerrini*.

(3) The *Martini* (1951) case—Also involved an employee (general superintendent) of a shoreside repair company. The Court relied on *Guerrini*, already discussed above, as a precedent for its decision, and is distinguishable for the same reason.

(4) The *Manera* (1954) case—Has already been reviewed, supra.

Finally, the Court below states, at pages 387-388 of its opinion that petitioner should not be afforded the seaworthiness doctrine, because, among other reasons:

> "The appellant has his statutory remedy against the employer [Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq.]."

This simply reiterates the unavailing dissenting views specifically expressed by the minority Justices in the *Petterson* case (347 U.S. at page 402), and inferred by the Justices who were in the minority in *Hawn* (346 U.S. at page 419). If, as we maintain,

petitioner is entitled to the warranty of seaworthiness, he should not be deprived of it simply because he may also be entitled to what may properly be described as an *alternative* benefit guaranteed under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, et seq.

The effect of the decision of the Court below limits, if indeed it does not overturn, the doctrines established by this Court and other Circuit Courts in like cases. It should therefore be reviewed by this Court, for the judgment below has the effect of destroying the vitality of this Court's extension of a shipowner's warranty of seaworthiness, to others than seamen.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
May 14, 1957.

Respectfully submitted,

JAY A. DARWIN,
Attorney for Petitioner.

(Appendix Follows.)

United States Court of Appeals
for the Ninth Circuit

William Berryhill, *Appellant,* vs. Pacific Far East Line, Inc., a Corporation, *Appellee.*	No. 14,993 Oct. 24, 1956

Appeal from the United States District Court
for the Northern District of California,
Southern Division

Before: Stephens, Bone, and Barnes, Circuit Judges

Barnes, Circuit Judge

Appellant sues for personal injuries sustained when a grinding wheel, owned and furnished by appellant's employer, Todd Shipyards Corporation, shattered or disintegrated while the S.S. "Flying Dragon", owned by appellee, was docked for repairs. These repairs were performed under contract made between the appellee shipowner and the Todd Shipyards Corporation. The grinding wheel had been attached to a portable grinding machine or tool, owned and furnished by Todd. Repairs were being made on the "shaft keyway" of the ship.

Appellant's complaint and the interrogatories filed show that the grinding wheel was alleged to have been unseaworthy. Appellee's motion for judgment in the pleadings was granted. This appeal followed.

Appellant relies on the theory expressed in *Seas Shipping Company v. Sieracki*, 328 U.S. 85 (1946), and subsequent cases hereinafter discussed. In the *Sieracki* case, a shoreside worker, (a stevedore), was held covered by the shipowner's absolute liability for breach of warranty of seaworthiness.

In that case the latent defect was in the ship's shackle which supported the ship's boom. The person injured was loading cargo aboard the ship; traditionally a part of "the ship's work".

Appellant quotes in his brief the following language from that case:

> "On principle we agree with the Court of Appeals that this policy (warranty of seaworthiness) is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent, or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection." [Appellant's Brief, p. 6]

In the Supreme Court case which followed the *Sieracki* decision and refused to limit the extension

of the doctrine of absolute liability to stevedores, alone, was *Pope and Talbot, Inc. v. Hawn,* 346 U.S. 406, (1953). There the injured man, an employee of an independent contractor, was a workman adjusting "feeders" used to load the vessel with grain. He was injured by falling thru an uncovered hatch.

In *Torres v. The Kastor, et al.,* 227 F.2d 664 (C.A. 2, 1955), an independent contractor was cleaning a vessel of loose pitch, to make the vessel ready for general cargo. Again, such labor is traditionally a part of ship's work, usually performed by the crew.

In *Petterson v. Alaska Steamship Company,* 205 F.2d 478 (C.A. 9, 1953), this Court held the shipowner liable for unseaworthiness when a stevedore was injured because a snatch-block broke. This snatch-block had been brought aboard the vessel by the injured man's employee. The operation, to-wit: loading, was again part of the traditional "ship's work".

The Supreme Court, in a per curiam decision, 347 U.S. 396 (1954), affirmed this Court's decision. Mr. Justice Burton dissented, and was joined by Mr. Justice Frankfurter and Mr. Justice Jackson. The dissent points out that the *Sieracki* and *Hawn* cases

> "assert the liability of a shipowner to stevedores and carpenters for the unseaworthiness of his (the shipowner's) ship and its equipment * * *. They assert the liability of a shipowner to stevedores and carpenters who, in consequence of the unseaworthiness of his ship or its equipment, are injured on board *in navigable waters while engaged in work in loading or unloading the ship.* Those cases establish that such liability for un-

seaworthiness exists although the injured maritime workers are not employees of the shipowner but are employees of a third party who is under contract to supply stevedoring services." (Italics added.)

The dissent points out that the majority affirmance in *Petterson* goes one step further than *Sieracki* and *Hawn* cases, in holding that the equipment which causes the injury need not belong to the shipowner nor be a part of the ship's equipment.

Just how far should this doctrine be extended?

The doctrine of seaworthiness, and the shipowners' absolute liability for the lack of it, was first enunciated in *The Osceola,* 189 U.S. 158 at 175 (1902):

"The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."

This was because the Master's power was absolute on any ship. In any weather and under any conditions the seaman was required to do the ship's work, with the equipment furnished by the shipowner, and in whatever places or areas the master saw fit to order.

The *Sieracki* case extended the indemnity to stevedores, says Justice Burton in his dissenting *Petterson* opinion:

"* * * largely on the premise that the stevedores were then rendering services usually and formerly performed by the crew. The decision assumed the

stevedores, like their predecessors, used the ship's equipment." 347 U.S. 396 at 400.

To quote the *Sieracki* case directly:

"For these purposes he [the stevedore] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." 328 U.S. 99.

The *Hawn* case extended the doctrine to a carpenter. Hawn was not a stevedore, but a workman repairing the equipment the stevedores used to unload the ship. Thus, it had to do with "ship's work".

The *Petterson* case, by the majority opinion of the Supreme Court, extended the absolute liability to an injury to a stevedore caused by the breaking of a snatch-block, furnished by the stevedore's employer. This equipment took the place of equipment usually furnished and necessarily required by the ship. It was ship's equipment necessary to enable the crew to perform "ship's work", i.e., loading and unloading.

In *Rogers v. U. S. Lines,* 347 U.S. 984 (1954), the Supreme Court affirmed the Petterson holding. In that case the plaintiff, a stevedore, was injured when a "runner" furnished by plaintiff's employer, to be used on one of the vessel's winches for unloading purposes, was defective and broke. Again, the equipment was reasonably necessary to permit the stevedore to do the "ship's work" which historically it was the duty of the crew to perform.

The facts in this instant case seek to extend the doctrine of absolute liability for unseaworthiness

(*Mahnic v. Southern Steamship Company,* 321 U.S. 96, 100), beyond any previous holdings. Here the repairs had nothing to do with loading or unloading the ship. The propulsion machinery of the vessel itself was being repaired. Not all repairs are "ship's work", to be performed, historically or currently, by the crew.

The Supreme Court refers to the repairs Hawn was making to the loading equipment as "slight". The purpose of his repairing was to permit the loading "to go on at once". This would indicate a doubt in the court's mind if any very general repairs to a ship could, or should, be included as "ship's work". In the instant case, the repairs were nothing of an improvised, hurried nature, done to save the "ship's work" time, but were of sufficient importance to cause the ship to be drydocked.

The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends,[1] when the vessel is not on water. As the appellee here points out, a District Court said in *Manera v. United States,* 124 Fed.Supp. 226 (E.D. N.Y. 1954):

> "Since he was not a seaman and was not exposed to the peril of descending from the 'tween deck into the lower hold while the ship was rolling or pitching on the high seas, the test to be applied

---

[1]See:
Myers v. Pittsburgh Steamship Company, 165 Fed. 2d 642 (1948);
Guerrini v. United States, 167 F.2d 352 (1948);
Martini v. United States, 192 F.2d 649 (1951);
Manera v. United States, 124 Fed.Supp. 226 (1954).

was that of what a business guest would be entitled to exact from the ship while in the performance of such a task as he was engaged in while the ship was lying at this repair yard dock. It is believed that the foregoing is a correct statement in view of all that was written in *Pope and Talbot v. Hawn,* 346 U.S. 406." [Brief of Appellee, p. 9]

The *Sieracki,* the *Hawn* and the *Petterson* cases have indeed extended the rule of *The Osceola* case. Appellant asks us to step one further pace toward an absolute liability of the owner of a vessel for defects existing in equipment that the ship could do without, that the owner may never have bought or even seen, or have had any reason to know it existed.

The appellant has his statutory remedy against his employer. [Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq.] He has his common law remedy as a business invitee against the shipowner, if he can prove the latter's negligence. In view of such rights and protection, he does not need, nor should he ask, for the further extension of a doctrine already stretched. If there exists a social need for such an extension (which we doubt in view of existing remedies), it is a matter for Congressional enactment, and not for this Court to bring about, thru judicial legislation. 342 U.S. 282, 286.

Judgment affirmed.

Affirmed.

(Endorsed:) Opinion. Filed, October 24, 1956.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

William Berryhill, *Appellant,* vs. Pacific Far East Line, Inc., a Corporation, *Appellee.*	No. 14,993

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and Entered: October 24, 1956
Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpts from Proceedings of
Monday, February 18, 1957.

Before: Stephens, Bone and Barnes, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It is ordered that the petition of Appellant, filed February 8, 1957, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

It is further ordered that the suggestion for a rehearing en banc be, and hereby is rejected.

Office - Supreme Court, U.S.
FILED
JUN 17 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 1011

WILLIAM BERRYHILL,
Petitioner,

vs.

PACIFIC FAR EAST LINE, INC.,
a corporation,
Respondent.

Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Answer to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (R. 22-24) granting respondent's motion for judgment on the pleadings is reported in 138 Fed. Supp. 859 and 1956 AMC 235.

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 35-40) affirming the judgment for respondent is reported in 238 Fed. 2nd 385 and is quoted in full as an appendix to petitioner's petition.

STATEMENT

The facts disclosed by the record are not in dispute. They are summarized in the first paragraph of the opinion of the Court of Appeals as follows:

> "Appellant sues for personal injuries sustained when a grinding wheel, owned and furnished by appellant's employer, Todd Shipyards Corporation, shattered or disintegrated while the SS 'FLYING DRAGON', owned by appellee, was docked for repairs. These repairs were performed under contract made between the appellee shipowner and the Todd Shipyards Corporation. The grinding wheel has been attached to a portable grinding machine or tool, owned and furnished by Todd. Repairs were being made on the 'shaft keyway' of the ship." (R. 35)

The "shaft keyway" locks the ship's propeller to the shaft. Like the propeller, it is, of course, inaccessible for repairs when the vessel is waterborne, except to a professional diver and then only after the propeller has been taken off. Obviously the propeller had to be removed by the repair yard after the ship was drydocked in order to get at the keyway i.e. drawn into a space on the ship known as the "shaft alley" which petitioner mentions.

On these facts the District Court and the Court of Appeals both ruled against petitioner's contention that respondent must be held to warrant the seaworthiness of the drydock owners' grinding wheel.

QUESTIONS PRESENTED

Whether a shoreside machinist in the employ of an independent contractor and doing major repair work on board a vessel in drydock is doing a seaman's work and subjected to a seaman's hazards so that he would be entitled to a warranty of seaworthiness from the vessel owner.

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because:

1. This Court in prior decisions has amply defined the controlling factors to be followed in reaching a decision as to whether a shore-worker should be properly characterized as a seaman and therefore entitled to the implied warranty of seaworthiness from the owner of a vessel on whose ship he is performing services.

2. The decision of the Court of Appeals correctly applies the rule laid down by this Court in such cases.

3. There is no conflict between the decision of the Court of Appeals in the instant case and decisions in other circuits.

Respondent does not contest the general proposition that the shipowner's warranty of seaworthiness covers shoreside employees who perform work historically that of a seaman and are subjected to a seaman's hazards.

In *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 90 L.Ed. 1099 (1946) this Court held that stevedores are entitled to such warranty, stating:

> "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew (citing cases)." *Sieracki* at page 96.
>
> "• • • (The stevedore) is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Sieracki* at page 99.

In the case of *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L.Ed. 143 (1953) the Court reached the same conclusion where the workman involved was a stevedore-carpenter. The Court there said he "was put to work • • • so that loading could go on at once" (page 412). The ship was actually *loading* a *cargo* of wheat while the carpenter work was being done.

In *Alaska Steamship Company v. Petterson*, 347 U.S. 396, 98 L.Ed. 798 (1954) the ship likewise was being *loaded* by a stevedore company who had furnished equipment necessary to the loading, and the party hurt was a stevedore. The holding of the court below—the Court of Appeals for the 9th Circuit (205 Fed. 2nd 478)—was affirmed per curiam by this Court. The decision was that equipment necessary to the loading of the vessel furnished by the stevedore company was warranted as to its seaworthiness by the vessel owner. In substance the ruling was that the obligation to furnish a seaworthy ship and seaworthy appliances could not be delegated to the stevedore company.

In *Rogers v. U. S. Lines*, 347 U.S. 984, 98 L.Ed. 1120 (1954) the decision in the *Petterson* case was followed. In that case the plaintiff, a stevedore, was injured when a "runner" furnished by his employer, a stevedore company, and used on one of the vessel's winches for *unloading* purposes, broke because of defectiveness. Mention is made of the last two cases only because they are relied on by petitioner.

It may be added here that in the *Petterson* case the rule defined in the *Sieracki* and *Hawn* cases was again given expression in the dissenting opinion of Mr. Justice Burton, in which he was joined by Mr. Justice Frankfurter and Mr. Justice Jackson in the following language:

> "They (referring to the decisions in the *Sieracki* and *Hawn* cases) assert the liability of a shipowner to stevedores and carpenters who, in consequence of the unseaworthiness of his ship or its equipment, are injured on board *in navigable waters while engaged in work in loading or unloading the ship.* Those cases establish that such liability for unseaworthiness exists although the injured maritime workers are not employees of the shipowner but are employees of the third

party who is under contract to supply stevedoring services." (347 U.S. 396)

The majority affirmed the decision of the Court of Appeals for the Ninth Circuit per curiam. The only difference of opinion apparently, between the majority and the minority was that the minority thought the extension of the warranty of seaworthiness by the owner to equipment furnished by the stevedore company was unwarranted.

The foregoing cases show that in prior decisions of this Court the rule to be applied in the instant case has been amply defined; and, also show that the decision of the Court below, in this case, is not in conflict.

Petitioner here is not a seaman because he was not doing seaman's work. On the contrary, he was assisting in the performance of major repair work on the ship's propeller shaft; work that could be done only in drydock and with use of the shipyard equipment and skill. In short, it was a shipyard job involving facilities not available on shipboard, and training far beyond that which a seaman has or ever did have. This work bears no resemblance, historical or otherwise, to the seaman's labors; nor is there any similarity in the hazards connected with minor repairs sometimes made by a seaman to those involving "machine shop" work which petitioner was performing.

The *Sieracki* case (supra), on which petitioner places much reliance, is grounded on the principle that since the stevedore plainly does what formerly was the seaman's work, and incurs the seaman's hazards he should have the seaman's right to a seaworthy vessel and seaworthy appliances.

A vessel drydocked for repairs is withdrawn temporarily from commerce. Often her crew will be largely paid off and

only a skeleton crew left for security reasons while specialists such as petitioner take over. This is as true historically as it is today. Vessels have always needed the continuing attention of their builders or ship repair yards having specially trained men and special equipment, to maintain them in a condition fit to carry cargo. Only when repairs are completed and the vessel again waterborne, can the seaman or the stevedore commence his work of loading, stowing, etc. intimately connected with the handling of cargo and the earning of freight money.

From the standpoint of function, a wide gulf separates the petitioner here from the seaman and his present day in part substitute, the longshoreman.

Nor can it be said that we are confronted here with anything resembling an exposure to the hazards ordinarily connected with a seaman's work. Petitioner was working on board a vessel on land. Nothing attached to or used by the vessel caused his injury. The machine to which the grinding wheel was attached came from ashore and would be returned ashore when the job was completed. The only factual premise for petitioner's contention presented here is a geographical coincidence; i.e. that the grinding wheel happened to come apart in the shaft alley of respondent's vessel instead of ashore in petitioner's employer's machine shop.

Nothing in the language of *Sieracki* indicates an intention or suggests a reason to extend the scope of the doctrine of liability without fault to one so far removed from the work of a seaman and the attendant hazards.

Petitioner contends there is a conflict of authority because of the decision of the Court of Appeals in this case and points to two other cases; one from the Second Circuit and the other from the Sixth.

In the first of these cases, *Lester v. United States,* (CA 2 1956) 234 Fed. 2nd 625, the issue of whether or not libelant Lester was entitled to the warranty of seaworthiness was not raised. Consequently, even within that Circuit, the opinion has not been considered as any authority on the point. *Berge v. National Bulk Carriers* (DC SD NY 1957), 148 Fed. Supp. 608, a later District Court opinion in the Second Circuit, held squarely that a shoreside repairman is not entitled to the warranty of seaworthiness.

This should be sufficient to dispel any question of conflict with a decision of the Second Circuit on the point.

However, petitioner further quotes, apparently as collateral authority, a brief filed by the United States in this Court, opposing Lester's petition for certiorari in which the government counsel admits for the purposes of that case that Lester was entitled to a seaworthy vessel. Counsel for the Government doubtless had some special reason in mind for making such an admission, but obviously admissions of counsel in any case do not make law.

In other cases, counsel for the United States have successfully advanced the diametrically opposite view, among which is the case of *West v. United States* (DC Penn. 1956) 143 Fed. Supp. 473, where the court held that a shoreside repairman was not entitled to the warranty of seaworthiness.

In the second case relied on by petitioner, *Imperial Oil Ltd. v. Drlik,* 234 Fed. 2nd 4 (1956), decided by the Court of Appeals for the Sixth Circuit there is not any conflict with the decision of the Court below. This is readily apparent from the facts, which are not adequately set forth in petitioner's brief. They are given in detail in the written opinion of the trial court, *Drlik v. Imperial Oil Ltd.* (DC ND Ohio 1955), 141 Fed. Supp. 388. Drlik was not a repairman as petitioner contends. On the contrary he was a line handler. At the time he received his injuries respondent's

vessel was waterborne and proceeding out of drydock. Drlik was shifting the vessel's mooring lines in the customary manner, i.e., as seamen do whenever a vessel is moving on her lines along a wharf. He was injured because a winch driver on the vessel, in ignorance of Drlik's peril, (no watchman was posted at the ship's rail) suddenly took in the slack of the mooring line Drlik was handling, causing him to fall. There is a further indication of the seamanlike nature of Drlik's duties to be found in the trial court's opinion. That court specifically found for Drlik on the issue of negligence because the evidence proved that "it has been the invariable practice of the respondent to post a watchman at the rail * * * *whenever its own crew has in the past handled the shore end of the cable.*" 141 Fed. Supp. 388 at page 391, (emphasis added). The contrast between the facts of *Drlik* and *Berryhill* are great and obvious and require a different decision.

Drlik was subjected to and injured by the hazards inherent in handling a mooring line attached to a ship's winch while the vessel is moving along a dock. Berryhill was not subjected to any risk inherent or peculiar to the seaman's trade; his injury resulted from a machine shop hazard.

Certainly in the light of these controlling factual differences, there is no ground for assuming that the Ninth Circuit would decide Drlik's case differently or that the Sixth Circuit would in the future be compelled to reject the reasoning of the *Berryhill* case.

CONCLUSION

The petition fails to show any reason for granting the writ of certiorari prayed for because:

1. There is no need for further definition because this Court in prior decisions has amply defined the controlling factors to be followed in such a case as this.

2. The decision of the Court of Appeals correctly applies the rule laid down by this Court in such cases.

3. There is in fact no conflict between the decision of the Court of Appeals in the instant case and the decisions in other circuits.

Therefore, it is respectfully submitted that the petition for writ of certiorari should be denied.

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I, JOHN HAYS, counsel for respondent, Pacific Far East Line, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 14th day of June, 1957 I served copies of the foregoing brief on counsel for petitioner by mailing copies to his office in duly addressed envelope.

JOHN HAYS
Attorney for Respondent